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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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ANA LOPEZ DEMETRIO and FRANCISCO EUGENIO PAZ,
individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs,

v.

SAKUMA BROTHERS FARMS, INC.,

Respondent/Defendant.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE LABOR COUNCIL, AFL-CIO
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTEREST OF AMICUS CURIAE

The Washington State Labor Council, AFL-CIO (WSCL), and the Washington Employment Lawyers Association (WELA) have an interest in ensuring that agricultural employees receive paid rest breaks as required by law. See WSCL and WELA Motion to Appear as Amicus.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Agricultural workers have historically been excluded from many of the legal protections afforded most employees. In this state, it is only relatively recently that the Legislature ordered basic legal protections to be extended to farmworkers, including mandatory rest breaks. RCW 49.30.030 (former), Laws of 1989, ch. 380, §85. In this case the Court is asked to decide if that protection is meaningful or illusory. From the standpoint of statutory interpretation, it is plain that agricultural workers are entitled to paid rest breaks. From a practical perspective, it is equally clear that the workers in this case are not paid for rest breaks. They are only paid when they work; when they rest, they are not paid. And from a policy perspective, the interest in mandating rest breaks can only be furthered by requiring them to be paid, at the same rate the workers earn during the time they spend engaged in work. WELA urges the Court to hold that agricultural employers have an obligation under WAC 296-131-020(2) to separately pay piece-rate workers for the rest breaks to which they are entitled, at the regular rate the workers earn during that pay period.

III. STATEMENT OF THE CASE

Plaintiffs are a class of farmworkers paid at piece rates for their work by their employer Defendant Sakuma Brothers Farms. Sakuma does not pay the workers for time they spend on rest breaks. Plaintiffs sued in federal district court in October of 2013. In May of 2014, the parties settled the plaintiffs' claims for backpay damages, and agreed to present the claim for future injunctive relief to the court. The district court certified two questions to this Court:

> 1. Does a Washington agricultural employer have an obligation under WAC 296-131-020(2) and/or the Washington Minimum Wage Act to separately pay piece-rate workers for the rest breaks to which they are entitled?
>
> 2. If the answer is "yes," how must Washington agricultural employers calculate the rate of pay for the rest break time to which piece rate workers are entitled?

The Court accepted certification of the questions as written; principal briefing is complete and oral argument is scheduled for March 17, 2015.

IV. ARGUMENT

A. Because WAC 296-131-020(2) Requires Employee Rest Breaks "On The Employer's Time," Agricultural Employers (Like Other Employers) Must Provide *Paid* Rest Breaks For Their Employees.

Under the Washington Administrative Code, agricultural employees "shall be allowed a rest period of at least ten minutes, *on the employer's time*, in each four-hour period of employment." WAC 296-131-020(2) (emphasis added). The key phrase in the regulation is "on the employer's time," which the Court of Appeals previously construed in the non-agricultural work break regulation, WAC 296-126-092(4). *Pellino v.*

Brink's Inc., 164 Wn.App. 668, 687-88, 267 P.3d 383 (2011). *Pellino* held that "on the employer's time" means employers have a "mandatory obligation" to provide *paid* rest breaks. *Id. See also White v. Salvation Army*, 118 Wn. App. 272, 282, 75 P.3d 990 (2003) ("The term 'on the employer's time' is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.").

Pellino is consistent with this Court's decisions in *Wingert* and *Sacred Heart*, where this Court also held that WAC 296-126-092(4) requires employers to provide paid rest breaks. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002); *Wash. State Nurses Ass'n v. Sacred Heart Med. Center,* 175 Wn.2d 822, 287 P.3d 516 (2012).

Pellino cited and relied upon the Department of Labor and Industries ("DLI") administrative policy on rest breaks. *Pellino,* 164 Wn.App. at 668 (quoting DLI Administrative Policy ES.C.6, §10, at 4 (rev. June 24, 2005)). The administrative policy expressly states that "on the employer's time" means employees must receive *paid* rest breaks:

> **9. What is the rest period requirement?**
>
> Employees shall be allowed a rest period for not less than ten minutes on the employer's time in each four hours of working time. . . . Employees may not waive their right to a rest period.
>
> **10. What is a rest period?**
>
> The term 'rest period' means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. . . . *The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.*

DLI Administrative Policy ES.C.6, at 4 (emphasis added) (accessible at http://www.lni.wa.gov/WorkplaceRights/files/policies/esc6.pdf, last accessed on January 22, 2015).

Because the same phrase requiring rest breaks "on the employer's time" appears both in the agricultural employee rest break regulation (WAC 296-131-020(2)) and the non-agricultural employee rest break regulation (WAC 296-126-092(4)), the language must be construed the same. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 722, 748 P.2d 597 (1988). Just as the non-agricultural employee rest break regulation requires paid rest breaks, so must the identically phrased agricultural rest break regulation.

DLI understands that WAC 296-131-020(2) requires paid rest breaks for agricultural employees. The agency interpretation on its website states:

> **Agricultural workers get rest breaks and meal periods too**
>
> **What are the rest break and meal period requirements for agricultural workers?**
>
> • One 10-minute paid rest break for each 4 hours worked.

http://www.lni.wa.gov/WorkplaceRights/Agriculture/Breaks/default.asp (last accessed January 19, 2015) (emphasis added).

Sakuma surprisingly contends that this Court's decisions in *Wingert* and *Sacred Heart*, and the Court of Appeals' decision in *Pellino*, are "irrelevant" here. *See* Responsive Br. at 16-18. First, Sakuma contends that those cases only required pay for "missed" breaks, not pay for breaks that are actually taken. *Id.* at 16-17. But that is a nonsensical

position. The reason the courts have held that employees are entitled to pay for *missed* breaks is the requirement that breaks must be *paid* in the first place. *See, e.g., Sacred Heart*, 175 Wn.2d at 831 (employees must be paid for the time allotted for rest "whether they are able to actually rest or not"); *Wingert*, 146 Wn. 2d at 849 (because the law requires paid rest breaks, when employees miss breaks, "their workday is extended by 10 minutes."); *see also White*, 118 Wn. App. at 282 ("The term 'on the employer's time' is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period."). In those cases, involving hourly workers, there was no dispute that the employees should be (and had been) paid for the time they should have been allowed to rest; the dispute was about the appropriate remedy for having worked through the paid breaks. *See, e.g., Wingert*, 146 Wn. 2d at 848-49 ("This case does not present the usual situation where employees seek to recover wages for uncompensated work."). Here, the workers are not being paid for the time they should be allowed to rest, which is an even more fundamental violation of the law mandating paid rest breaks.

Sakuma also attempts to distinguish *Pellino* by arguing that under the agricultural employee regulation, WAC 296-131-020(2), "the actual taking of rest breaks is a voluntary decision for the workers" and there is no "mandatory obligation" on agricultural employers to ensure rest breaks are taken. Responsive Br. at 18. This argument is directly contrary to the express language in the regulation: "Every employee *shall* be allowed a rest period of at least 10 minutes, on the employer's time, in each four-

hour period of employment." WAC 296-131-020(2) (emphasis added). This is the very same language the court relied upon in *Pellino*, concluding the word "shall" in the corresponding non-agricultural regulation creates a mandatory duty for the employer; it is not a "voluntary decision" by the employee. *Pellino*, 164 Wn. App. at 688 (quoting WAC 296-126-092(1)); *Scannell v. City of Seattle*, 97 Wn.2d 701, 704-05, 656 P.2d 1083 (1982) (clause with term "shall" imposes mandatory duty on employer to provide employees vacation pay).

DLI's administrative policy interprets the same "shall" language in the non-agricultural employee rest break regulation as mandating rest breaks and holds that rest breaks are not a "voluntary decision" by the employee: "Employees *may not waive their right to a rest period.*" DLI Administrative Policy ES.C.6, at 4 (emphasis added). There is no difference for agricultural employees.

Sakuma also contends it "strictly enforces rest breaks" to ensure they are taken. Responsive Br. at 18. Leaving aside the question of whether this unsupported factual assertion is accurate,[1] the Court's construction of the regulation here will apply to agricultural employees on a statewide basis and it will determine whether employees are paid for rest breaks that are taken and paid for rest breaks that are missed. As the district court said in its order certifying the questions here: "*a decision on whether or not they are entitled to paid breaks*, or *payment for missed*

[1] Sakuma's record citation is to its obligations under a settlement agreement. Responsive Br. at 3 (citing Dkt. 27 at 8:12-13).

breaks, will have far reaching effects in terms of both workplace conditions and fair wages." Dkt. 42 at 4:21-22 (emphasis added).

Sakuma tries to avoid the language in WAC 296-131-020 requiring rest breaks "on the employer's time" by pointing to a different sentence in the regulation that states "[f]or purposes of computing minimum wage on a piecework basis, the time allotted an employee for rest periods shall be included in the number of hours for which the minimum wage must be paid." WAC 296-131-020(2). But this provision is about calculating minimum wage; it only concerns whether employees are receiving the minimum wage for their work when their piece-rate wage is averaged over their working hours (including time for rest breaks). The provision does not concern whether the employees are receiving any pay for their rest breaks, which is required under the preceding sentence in the regulation. *Id.*

Sakuma's interpretation of the regulation would render the phrase "on the employer's time" meaningless. It would also result in employees receiving *no pay* whatsoever for both rest breaks taken and rest breaks missed, which is contrary to the express language in the regulation stating the rest break must occur "on the employer's time."[2]

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[2] Sakuma also argues that California law cited by the employees in support of paid rest breaks for pieceworkers is inapplicable because Washington follows the FLSA in calculating minimum wage on a workweek basis. Responsive Br. at 19-22 (discussing *Bluford v. Safeway Stores Inc.*, 216 Cal. App. 4th 864 (2013)). This is mistaken; Washington courts often decline to follow the FLSA when interpreting the MWA. *See Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 872-873, 93 P.3d 108 (2004); *Drinkwitz v. Alliant Techsys., Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000); *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982)), and Washington courts would almost certainly adopt a per-

B. Piece-Rate Pay Does Not Include Pay for Rest Breaks Because By Definition Piece-Rate Pay Only Compensates Employees For the Time They Are Engaged in Work.

A piece-rate wage inherently does not pay employees for rest breaks because the piece-rate wage only pays employees for their time engaged in work. Piece-rate employees only receive pay for the amount of fruit they pick, and if the employee stops picking fruit to take a rest break, the employee *stops* receiving any pay. And when the employees miss rest breaks because they are trying to pick more fruit before the end of the day, they receive no additional compensation for the missed rest break. Dkt. 33 at 7:12

Accordingly, if the piece-rate pay is $1.00 for every pound of berries an employee picks and an employee picks 100 pounds of berries over eight hours, and takes two rest breaks in those eight hours, the employee is paid $100 for the day. If another employee picks the same amount of berries over 10 hours with no rest breaks, the employee is paid the same $100 for the day. Both employees are receiving *no pay* for rest breaks and instead *all pay* they receive is based on the amount of fruit they pick during their productive working time.

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hour approach to minimum wage compliance, like California has. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 912 (9th Cir. 2003) (concluding Washington is likely to adopt a per-hour measure); *Miller v. Farmer Bros Co.*, 136 Wn. App. 650, 656, 150 P.3d 598 (2007) ("Under the Act, employees must be paid per hour, and must receive at least the minimum wage."). While no court has determined whether such an approach should extend to a piecework context as *Bluford* did, this Court should not and need not reach that question here, as the plaintiffs' right to be paid for rest breaks is principally based on the Industrial Welfare Act, RCW 49.12, and its regulations, not the Minimum Wage Act. *See also infra* section D.

Sakuma misstates the issue to be whether the employees are entitled to "*additional*" pay for their rest breaks. In fact, the employees receive *no pay* for their rest breaks. There can be no dispute that the employees here do not receive paid rest breaks, because they do not receive any pay for the time they are or should be taking a rest break.

C. If Agricultural Employers Do Not Have to Pay for Rest Breaks, Then Agricultural Employees Will Suffer Increased Accidents, Injuries, and Illness—the Precise Societal Ill That Paid Rest Breaks are Intended to Prevent.

In *Sacred Heart,* this Court expressly recognized that paid rest breaks are mandatory in Washington because rest breaks promote both "employee health" and "employee efficiency." *Sacred Heart*, 175 Wn.2d at 832. And compensating employees for their rest breaks, both taken and those missed, "will help to ensure that employers continue to provide these breaks to their employees." *Id.*

"Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor." *Murphy v. Kenneth Cole Prod.*, 155 P.3d 284, 296, 40 Cal.4th 1094 (Cal. 2007) (citing Tucker et al., *Rest Breaks and Accident Risk*, 361 The Lancet, Issue 9358, p. 680 (Feb. 22, 2003); Dababneh et al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers,* 2 Ergonomics, pp. 164–174 (2001); Kenner, *Working Time, Jaeger and the Seven–Year Itch* 11 Colum. J. Eur. L. 53, 55 (2004/2005)).

Data compiled by DLI concerning workers' compensation show the high number of accidents and injuries incurred by farm workers.[3] For fiscal year 2014, there were 3,827 reported claims for injuries, at an average cost of $4,621, and total cost to the fund of $17.6 million. For fiscal year 2013, there were 3,449 reported claims for injuries, at an average cost of $5,292, and total cost to the fund of $18.2 million.[4]

DLI data show that the accident types for farmworkers include bodily reactions, workers caught in or compressed by equipment or objects, falls to lower level, overexertion, repetitive motion, workers rubbed or abraded by friction or pressure, and workers struck by or against objects.[5]

Rest breaks will not eliminate every accident incurred by farm workers, but ensuring farm workers receive paid rest breaks will help minimize the number of accidents and injuries incurred by farm workers. *Sacred Heart*, 175 Wn.2d at 832; *Murphy*, 155 P.3d at 296. The Court should thus reject Sakuma's interpretation of the rest break regulation, because it will result in more accidents, injuries, and illnesses for farm workers than if they receive paid rest breaks. Sakuma's position is thus

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[3] The data do not include injuries and costs for those employees working for a self-insured employer.

[4] Excel Spread Sheet titled "Occupation" at p. 5 of 15 on DLI website: http://www.lni.wa.gov/ClaimsIns/Insurance/DataStatistics/WorkersCompData/default.asp (last accessed on January 23, 2015).

[5] Excel Spread Sheet titled "Occupation and Accident Type" at p. 56-57 of 171: http://www.lni.wa.gov/ClaimsIns/Insurance/DataStatistics/WorkersCompData/default.asp (last accessed on January 23, 2015).

not only contrary to the language in the rest break regulation, but Sakuma's position is also contrary to the public policy behind paid rest breaks.

D. Pieceworkers Are Entitled to Be Paid Their "Regular Rate" During Their Rest Breaks.

Agricultural employers should be required to pay their employees at their regular rates for the time they spend on mandatory rest breaks. All other employees are paid their regular rates during mandatory rest breaks and there is no reason agricultural employees should be treated any differently. Furthermore, allowing employers to pay employees less than their regular rate during rest breaks would diminish the value of and incentive to take rest breaks, directly undermining the policy underlying mandatory rest breaks discussed above.

Sakuma urges the Court to hold that farmworkers are only entitled to the minimum wage during their mandatory rest breaks. In doing so, they mistake the applicable legal theory. While it is true that the Minimum Wage Act does not compel employers to pay rates higher than the minimum wage, the employees here have sought relief under RCW 49.52 as well. Dkt. 19 at 15. As this Court recognized in *Seattle Professional Engineering Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 840, 991 P.2d 1126 (2000), employees have a viable remedy under that statute for wages due "at the appropriate contractual rate" for unpaid hours worked. And as this Court recognized in *Wingert*, employees can recover for violations of the right to paid rest breaks under RCW 49.52 or through

an implied right of action under the Industrial Welfare Act, RCW 49.12, the statute upon which the rest break rule is based. *Wingert*, 146 Wn. 2d at 850-51.

The employees here, like all workers whether paid hourly or otherwise, had a contractual right to be paid at particular rates. They have a legal right to be paid those rates during their mandatory paid rest breaks.

V. CONCLUSION

Because agricultural workers are guaranteed paid rest breaks, and the workers here are not paid during the time they take rest breaks, this Court should answer the certified question "yes," hold that such workers are entitled to be paid for their rest breaks, and conclude that they must be paid their regular rates for that pay period.

DATED this 30th day of January 2015.

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I certify under penalty of perjury in accordance with the laws of the State of Washington that the attached Brief of Amicus Curiae Washington Employment Lawyers Association was filed on January 30, 2015 with the Supreme Court in Olympia, Washington, by email to SUPREME@COURTS.WA.GOV.

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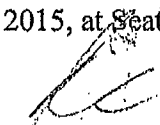

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Attached for filing please find 1) Motion for Leave to Appeal as Amicus Curiae By WELA; 2) Brief of Amicus Curiae WELA.

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